



**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CORAM: D. S. MAJANJA J.**

**CIVIL APPEAL NO. 40 OF 2019**

**BETWEEN**

**JOSEPH NJERU LUKE .....1<sup>ST</sup> APPELLANT**

**MONICA KINYUA.....2<sup>ND</sup> APPELLANT**

**JOSEPH NDIRANGU WAMBUI .....3<sup>RD</sup> APPELLANT**

**SAMUEL MUGO .....4<sup>TH</sup> APPELLANT**

**AND**

**STELLAH MUKI KIOKO .....RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon.T. Murigi, CM dated 26<sup>th</sup> February 2019 at the Thika Magistrates Court in Civil Case No.1105 of 2016)***

**JUDGMENT**

1. This is an appeal against the award of Kshs. 1,700,000/- and Kshs. 75,530/- as general and special damages respectively assessed by the trial court. On 24<sup>th</sup> September 2016, the respondent was a passenger in motor vehicle registration KBJ 511D which was travelling along Matuu – Thika Road. It lost control and collided with motor vehicle registration number KBB 977P. The respondent was injured as a result and sued for damages. The issue of liability was settled in the ratio 90:10 against the appellants.

2. As this is an appeal against an award of damages, the general principle applicable is that the appellate court should be slow to interfere with the discretion of the trial court to award damages except where the trial court acted on wrong principles of the law, that is to say, it took into account an irrelevant factor or failed to take into account a relevant factor, or due to the above reasons or other reason, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (see **Butt v Khan [1982-88]1KAR 1** and **Mariga v Musila [1982-88] 1 KAR 507**).

3. Both parties filed written submissions. Counsel for the appellant argued that the award was inordinately high bearing in mind the nature of injuries and the authorities cited and as such it represented an entirely erroneous estimate of damages. Counsel for the respondent urged the court to uphold the award of the trial court as the appellant had not established any basis for the appellate court to interfere with the award. He urged that the award of general damages was reasonable given the serious injuries sustained.

4. According to the plaint, the respondent sustained a blunt injury on the scalp, head concussion, blunt injuries on the chest, back and left buttock, bruises on the left knee and fracture of the pelvis, that is, the left superior and inferior pubic rami. Dr Nassir Bhanji (PW 1), a surgeon and traumatologist, testified that he examined the respondent on 17<sup>th</sup> January 2017. He stated that she sustained several soft tissue injuries and a fracture of the pelvis. She was initially admitted at Thika General Hospital overnight and given bed rest for a week. PW 1 noted that on examination, the respondent had pain on the left hip and walked with a limp. In his report dated 23<sup>rd</sup> January 2017, PW 1 stated that:

*Stellah Mukii Kioko sustained severe injuries to the pelvic, blunt head injury as well multiple soft tissue injuries during the accident ..... The injury to the pelvis must have been severe enough to have caused fractures of both the superior and inferior ramii. She had to be taken to Thika District Hospital where she had to be admitted for a night and thereafter had to have bed rest for several months before she could resume her work.*

As regard the prognosis, the doctor noted as follows:

*The injury that caused a fracture .... Also damaged the soft tissue around the fractured sites. Those soft tissue injuries usually heal by process of scarring. Caught up in the scarring are blood vessels, nerves and lymphatic vessels traversing through. Changes in weather conditions or period of stress would cause contraction of the scar tissue leading to irritation of the nerves .... This irritation causes pain ... [which] is a feature of permanent nature ..... The physical examination also revealed spasm of the muscles of the thigh ..... It is unlikely that Stellan Mukii Kioko would be free from her complaint in the near future.*

5. In order to guide the trial magistrate parties relied on written submissions. The appellant proposed Kshs. 250,000/- as general damages based on ***Fast Choice Company Limited and Another v Hellen Nungari Ngure* NKU HCCA No. 6 of 2010 [2011] eKLR** where the plaintiff suffered a comminuted simple fracture of the shaft of the right humerus middle 1/3, bruised right small finger and soft tissue injuries of the chest and anterior wall. The trial magistrate awarded Kshs. 450,000/- as general damages which was reduced Kshs. 180,000/- on appeal in 2011.

6. The respondent submitted that Kshs. 2,500,000/- as general damages was sufficient to compensate her. The respondent cited the case of ***Millicent Atieno Ochuonyo v Katola Richard* HCCC No. 38 of 2012 [2015] eKLR** in which the plaintiff sustained pelvic injuries with fracture of the right pubic ramus and diastasis of the pubis symphysis. She also sustained a small abdominal wall haematoma and minimal haemoperitoneum.

7. After considering the evidence and parties' submissions, the trial magistrate came to the following conclusion:

*I have carefully considered the evidence on record, the written submissions by both parties and the authorities annexed thereto. I have also considered the time when the awards were made and I find that for the injuries suffered by the plaintiff an award of Kshs. 1,700,000 would adequately compensate her as general damages.*

8. I have also re-evaluated testimony of PW 1, noted the injuries sustained as recorded in the P3 form and medical records. As I understand the parties are not in disagreement about the nature and extent of the injuries sustained by the respondent. The issue is what is the appropriate award in light of the reported cases.

9. General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exact (see ***Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR**). I would also add what the Court of Appeal stated in ***Mbaka Nguru and Another v James George Rakwar* NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR** that:

*The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.*

10. In addition, the current value of the shilling and the economy have to be taken into account and although astronomical awards must be avoided, the court must ensure that awards make sense and result in fair compensation (see ***Kigaraari v Aya* [1982-88] 1 KAR 768 *Uguya Bus Service v Gachoki* NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR** and ***Jabane v Olenja* [1986] KLR 661**).

11. Unfortunately, both counsel for the parties failed to provide the trial magistrate with recent and relevant cases to enable the trial magistrate assess and determine an appropriate award in light of decided cases. It is inappropriate for parties to thrust upon the trial court, a decision which may be an outlier and hope that the trial magistrate comes up with an appropriate award. I would also adopt what Ngaah J., stated in ***Penina Waithira Kaburu v LP* NYR HCCA 59 of 2016 [2019] eKLR** as follows:

*While no injuries occurring in different circumstances can be similar in every respect and hence the possibility of varied awards in general damages, the trial court must always make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions. As I have stated elsewhere, if not for anything else, the comparison is necessary for purposes of certainty and uniformity; the award must, as far as possible, be comparable to any other award made in a previous case where the injuries for which the award are relatively similar.*

12. The High Court has decided several cases where the plaintiff has sustained a fracture of the pelvis. In ***Muthamiah Isaac v Leah Wangui Kanyingi* NRB HCCA No. 653 of 2011 [2016] eKLR**, the plaintiff sustained a fracture of the right superior and inferior pubic rami and blunt injury to the left leg. The court awarded Kshs. 400,000/- as general damages in 2015. In ***Lilian Wanja v Cyprian Mugendi Igonga and 2 Others* CKA HCCA No. 24 of 2015 [2016] eKLR** the plaintiff sustained a fracture/dislocation of the hip and multiple soft tissue injuries and the court awarded Kshs. 500,000/- in 2016. In ***George Osewe Osawa v Sukari Industries Limited* [2015] eKLR** the plaintiff sustained a fracture of the pelvis and was awarded Kshs. 400,000/= in general damages in 2015. In ***Jane Muthoni Nyaga v Nicholas Wanjohi Thuo & Another* [2010] eKLR** the court awarded Kshs 300,000/- as general damages for a fracture of the right superior and inferior pubic rami of the pelvis; a cut on the right leg and central dislocation of the hip. In ***Ali Malik Brothers Motor (K) Limited and Another v Emmanuel Oduor Onyango* NRB HCCA No. 252 of 2016 [2018] eKLR**, the plaintiff sustained a fracture of the pelvic sprain hymen and cuts of the right knee and was awarded Kshs. 700,000/- which was affirmed by the High Court.

13. As PW 1 noted the respondent sustained pelvic fractures and soft tissue injuries. Although he did not assess any disability, his concern was that the respondent would continue to suffer pain in future. Taking all this into account the decisions cited, the rate of inflation and other imponderables, I would award the respondent Kshs. 750,000/-

14. I allow the appeal, set aside the award of general damages by the subordinate court and substitute it with an award of Kshs. 750,000/- as general damages. The award shall be subject to agreed contribution and shall accrue interest from the date of judgment before the subordinate court.

15. This appeal would have been avoided if both counsel for the parties had been diligent in citing appropriate cases. I therefore decline to award costs.

**DATED and DELIVERED at KIAMBU this 6<sup>th</sup> day of JANUARY 2020.**

**D. S. MAJANJA**

**JUDGE**

Mr Muthee instructed by Kairu and McCourt Advocates for the appellant.

Mr Omondi instructed by B. W. Kamunge and Company Advocates for the respondent.